SUBMISSIONS TO- TASK FORCE ON LEGAL AID

FROM- CANADIAN CIVIL LIBERTIES ASSOCIATION

DELEGATION- J.S. Midanik, Q.C., (Past President)

A. Alan Borovoy, (General Counsel)

Professor Donald Smiley, (Vice-President)

Robert Cooper, (Member-at-Large)

Toronto, Ontario

May 1, 1974

INTRODUCTION

The Canadian Civil Liberties Association is a national organization with a cross-country membership of more than three thousand individuals, eight affiliated chapters, and more than fifty associated groups which, themselves, represent several thousand people. Our membership roster includes a wide variety of callings and interests - lawyers, writers, housewives, trade unionists, minority groups, media performers, business executives, etc.

Among the objectives which inspire the activities of our organization is the desire to promote the concept of due process of law i.e. fair procedures for the determination of people's legal rights and obligations. It is not difficult to appreciate the relationship between this objective and the subject of legal aid. The most enlightened legislation in the world is of little value if financial incapacity and its attendant problems can prevent effective recourse to the benefits conferred. Persons who cannot sustain the costs and pressures of legal conflict are in no position to enforce the rights which the law has intended for them to enjoy.

For several years, Ontario has made available to its low income citizens a programme of publicly subsidized legal aid. Without question, this programme has enhanced substantially the state of due process in this Province. Thanks to the Ontario Legal Aid Plan, more people are receiving more legal protection than ever before in our history.

But, while the progress is heartening, the needs are staggering. At crucial points in the criminal process and in many civil matters of vital import, large sectors of our population are receiving little or no legal assistance. Many of the neglected people are unable to afford, and the Ontario Plan is failing to provide, the much needed legal service.

How, then, can this Province ensure for its citizens, in a context of professional excellence and independence, a more adequate level of legal protection at an acceptable cost to the parties involved?

The ensuing submissions represent the attempt of the Canadian Civil Liberties Association to answer this challenge. Unfortunately, however, our attempt has been limited by the exigencies of time, space, priorities, and the limits of our organizational experience. Among the notable omissions from this brief, for example, are recommendations regarding the important field of domestic and family law. We derive, however, some consolation from the knowledge that others, more experienced in these matters, have been slated to address the Task Force.

No one submission, of course, can hope to deal with all of the many matters of concern to this Task Force. But every submission, ours included, can hope to help, at least a little.

IMPROVING LEGAL AID
In
CRIMINAL MATTERS

Ensuring Timely Access to Counsel

The participation of legal counsel is probably nowhere more crucial than in the criminal process. The person accused of a criminal offence finds himself in conflict with the whole of society. All at once, he becomes the target of our collective powers and resources. In addition to such staggering odds, the accused faces dire consequences. The price of defeat could mean the loss of his freedom.

The lawyer is the indispensable instrument of equity between the powerful state and the beleaguered accused. Though the law clothes the accused with many safeguards, it cannot endow him with the ability to use them. Trained in the art of advocacy and the complexities of law, the lawyer is the one, perhaps the only one, who can transform theoretical safeguards into practical protections.

In Ontario, recognition of these truths is reflected in the ambitious character of our Legal Aid Plan. By subsidizing the legal fees of those without means, the Plan has succeeded in reducing the number of accused who are tried without counsel.

But representation at trial tells only part of the story. The standards of fairness require also representation before trial. Many accused people need and seek legal counsel at a much earlier stage of the proceedings. If they are arrested, they may want to know how to secure their pre-trial release. They may also want and need to know what they should say or refrain from saying to their captors. The provision or lack of competent legal advice at the early stages of the criminal process can substantially influence the outcome of the subsequent proceedings.

While we can be increasingly satisfied with the progress of Ontario's Legal Aid Plan in ensuring counsel at trial, we have reason for misgivings about the state of representation before trial. Within the last year, the Canadian Civil Liberties Association has conducted a number of surveys into the issue of access to counsel among arrested persons in this Province. Bearing in mind that a great many arrested people qualify for legal aid, our survey results reveal a rather serious gap in the present operation of the Plan.

In April 1974, the CCLA interviewed 59 randomly selected persons who had been recently arrested in 3 Ontario communities - Ottawa (21), London (28), and Kenora (10)

Of these 59 accused, 49 said that they were questioned by the police while in custody. 35 (or 72%) of those questioned said they made statements to the police, 66% of which they felt were self-incriminating. Despite such a large percentage of these accused people who were making statements of potentially irreparable prejudice, only one person in the entire sample consulted a lawyer prior to interrogation. And that case involved one of the least serious charges in the survey - impaired driving.

It is not difficult to anticipate that in a great many of these cases, the subsequent involvement of legal aid will be reduced to ritualistic significance. Apart from the few situations where there is evidence of undue police coercion, most of the confessions can be admitted as evidence at trial. Indeed, the impact of a confession is so great that many lawyers will feel obliged to advise their clients simply to plead guilty in court.

Thus the effective trial for a great many of these people is not the model envisioned by the Bill of Rights - a public hearing conducted, with the assistance of counsel, by an impartial judge. On the contrary, it is a private interrogation conducted, in the absence of counsel, by the very partial police.

The discrepancy between the importance of early consultation and the fact that so few exercise it, led us to investigate the machinery for facilitating custodial access to counsel, legal aid and otherwise.

In the first place, we wanted to know what provisions are made to inform arrested people of their general right to counsel. We cannot expect people simply to know their rights. Moreover, even those who know their rights, might be intimidated about asserting them in the frightening climate of a jail or stationhouse.

Accordingly, we asked what steps the police took to advise the arrested persons of their right to counsel. Forty- three of our informants maintained that at no stage of their confinement did the police advise them of this fundamental safeguard. Significantly, of the 49 who were questioned, as many as 41 or 84% reported that the police gave no advice about counsel, legal aid or otherwise, prior to the questioning.

Another relevant factor in facilitating consultation concerns the issue of access to the telephone. At present, the telephone is virtually the only practical avenue of custodial contact between accused and counsel.

22 of our interviewees said that they requested access to the telephone. But only 6 of them claimed that the request was granted immediately. 9 said the request was denied outright and 5 said that they had to wait longer than an hour. Significantly, of the 49 who were interrogated while in custody, only 2 used the telephone before their interrogations. But, even if more of these people had secured timely telephone privileges, what lawyers would they have called? Most accused people have neither the means nor the connections to command a consultation immediately upon request.

In order to promote more effective custodial access to counsel, the Ontario Legal Aid Committee in early January 1973 introduced a night duty counsel service in the City of Toronto. This service provided publicly paid lawyers to be available for all those arrested daily between the hours of 5 p.m. and 8 a.m.

Along with many others in the community, the CCLA enthusiastically welcomed this programme. Unfortunately, however, this promising new service appears to have made little difference in fact. In the year since the inauguration of the scheme, the CCLA has conducted three separate surveys into its operation. The results in all reveal a rather substantial dichotomy between the aspirations and the performance of the night duty counsel service.

Our most recent survey took place during April 1974. We interviewed a group of 40 randomly chosen people who had been arrested between the hours of 5 p.m. and 8 a.m. Of this group, 34 (or 85%) said that they had been questioned by the police, while in custody. Yet <u>not one</u> of them consulted counsel before interrogation. No doubt, this is at least partly attributable to the fact that only 6 (or 15%) of these accused reported any awareness of the new service. Incredibly, of our entire sample of 40 arrested people, only 2 said that the police bothered to tell them about the service. And one of these persons said that the police did not give him this information until <u>after</u> he was interrogated. In the result, of the 34 who were questioned, 18 (or more than 50%) made statements to the police, 67% of which they perceived as self-incriminating.

The results in our first two Toronto surveys, involving more than 150 arrested people, were substantially the same[1]. But, despite this experience, we believe that the principle of custodial duty counsel is worthy of perpetuation in Toronto and extension elsewhere. Obviously, however, more is required to make it work.

As we have seen, the mere existence of helpful services does not guarantee that the intended beneficiaries will know of them. Accordingly, the CCLA requests the Task Force to recommend a vigorous programme of public information both in Toronto and everywhere else that such services are established. Attractive and readable literature should be prepared and widely distributed, especially in places where legal aid clients are most likely to be reached - police stations, courts, legal clinics, welfare offices, unemployment insurance offices, schools, churches, hostels, settlement houses, immigrant aid services, etc. An imaginative publicity campaign might even include advertising in the print and electronic media, as well as displays in public transit vehicles. In our respectful opinion, the officials of the Legal Aid Plan should do everything reasonable and possible to ensure that their vital services are known to those who have need of them.

We suspect, however, that public information campaigns will not be sufficient. Even the most ambitious publicity campaign can miss affected people. Moreover, mere knowledge of a service and a right to use it cannot provide an arrested person with the courage to seek its benefits. An arrest situation is inherently intimidating. From the moment of arrest, the accused experiences a sudden isolation from his normal sources of psychological support. His sole companionship is provided by those who arrested him and by those who are guarding him. The consequent anxiety of arrested persons is not conducive to insistence on legal rights.

Accordingly, the Canadian Civil Liberties Association requests the Task Force to recommend additional measures to ensure the effectiveness of the Plan. In our respectful opinion, the Ontario Solicitor General should be asked to instruct all police departments and police officers to inform arrested persons in clear terms of their right to counsel and available legal aid at the earliest practicable moment after an arrest is effected. Whatever knowledge gaps may exist can be overcome if the arresting and custodial police officers convey the necessary information to arrested persons. Moreover, prisoners will be less intimidated about availing themselves of legal aid if those in authority advise them that it is proper to do so.

In order to make this measure workable, the Solicitor General should be asked also to instruct police departments and police officers to take all reasonable steps for the effectuation of communication between accused and counsel at the earliest practicable opportunity following arrest. Obviously, there is no point in having and knowing of the right of immediate consultation if access to communication is denied or delayed. This implies immediate access to a telephone in an area sufficiently private where the conversation cannot be overheard. It may also mean the allocation of a private room for counsel and accused to meet personally if they choose to do so.

One of the most prevalent and prejudicial consequences that attends the failure of accused persons to consult immediately with counsel is the making of self-incriminating statements. Frightened people, not properly advised of their rights, are often impelled to say things that could irreparably undermine the ultimate outcome of their trials. According to psychologists, there have even been occasions when custodial tensions produced false confessions of guilt.[2] Indeed, we believe that the Legal Aid Committee had all this in mind when it introduced the night duty counsel service in the City of Toronto. Thus, if the service is to accomplish one of the purposes for which it was conceived, it is essential that the police advise arrested people and make telephones available to them before they conduct their custodial interrogations. On this basis, we would recommend that the Solicitor General be approached to instruct police officers and police departments that, in the absence of some imminent and overriding peril, the obligation to advise accused persons about legal aid and to provide communication facilities for legal consultation, precede any custodial interrogations. In our respectful opinion, the adoption of these measures is vital to the satisfactory operation of the night duty counsel service.

Moreover, we have reason to believe that such reinforcements of the legal aid programme need not prejudice the interests of effective law enforcement. Scottish law, for example, goes considerably beyond our recommended safeguards in protecting the rights of the accused in custody. In Scotland there is a total ban on custodial interrogation by the police. This restriction is backed up by an exclusionary rule for statements obtained in violation of it.[3] Nevertheless, in 1971 Scotland had a crime clearance rate of 38.2%.[4] This compares favourably with Canada, which had a clearance rate in 1971 of about 35.5%.[5] Moreover, the conviction rates in these two countries show no significant difference.[6]

Data from the United States also appear to support the conclusion that improved custodial access to counsel is not incompatible with effective law enforcement. Since the 1966 decision of the United States Supreme Court in Miranda v. Arizona[7]

American law enforcement authorities have lived with a rule which makes custodial access to counsel a condition of the admissibility of custodial confessions[8]. Although there has been a decline in the confession rate in some places, competent studies have shown no significant reduction in the conviction or clearance rates since Miranda[9].

In the interests of ensuring timely access to counsel in criminal cases, it is essential that publicly paid duty counsel be available to all places of incarceration in the Province of Ontario. In the interests of making such a service viable, it is essential that there be adequate public knowledge and police co-operation. It is to serve these ends that we make the foregoing recommendations.

Correcting Pockets of Inequity

An Indian resident of the Grassy Narrows Reserve who is charged with a criminal offence will usually be obliged to travel to Kenora for his trial. He will probably be too poor to own an automobile and there is no public transportation within the region of his home. Thus the accused Indian would probably have to make the trip by taxi. The return taxi fare between Grassy Narrows and Kenora is $80.00.

Here we have one of the concealed costs of criminal justice to the Indians of the north. Many of the Indians throughout the north live considerable distances from the communities in which the closest criminal courts are located. In a number of areas there is no low cost public transportation and there are few cars available to these people. If these Indians become involved with the law, as many of them do, they must pay the additional penalty of hiring expensive taxi service.

Suffering the extreme poverty that they do, a good number of Indians are not able to afford the taxi fares. One year ago, "Indian Life and Canadian Law", the report of our research and educational organization, related many of the hardships which this problem inflicts upon Kenora area Indians.[10]

One Shoal Lake Indian, summonsed to appear in Kenora court, was forced to take an advance from his weekly wages because he could not afford the $28.00 return taxi fare. Another Shoal Lake Indian spent about two weeks in the Kenora jail. Upon being released, he found himself unable to return home because of lack of money. For the next few days, his bedroom was the Kenora out-of-doors. Living this way with so little money provided the setting for further trouble. Four days later, he was arrested on a drunk charge.

In another case, a Grassy Narrows Indian was picked up by the police in Kenora because of his failure to pay in time a fine he had sustained on an impaired driving conviction. The police told him that he would have to begin immediately to serve the alternate sentence of 15 days in jail. The Indian man's difficulty was compounded by the fact that he had his 13 year-old son with him at the time. Lacking sufficient funds to hire a taxi for the boy, the man requested the police to drive the boy to his home

in Grassy Narrows where he could stay with his grandfather. Upon his release from prison about two weeks later, the accused learned that the boy had spent the time in the custody of the Children's Aid Society. Thus, poverty and distance had conspired to impose a penalty not only on the convicted father, but also on the innocent son.

In a fourth case, a teenaged Indian girl was arrested for causing a disturbance at the Whitedog Reserve. The police drove her 30 miles to Minaki where they confined her overnight in the lock-up.

In the morning, after a night in the Minaki cells, the girl was released. Again, no money for the trip home. Instead, she hitch-hiked to Kenora, and remained there for a few days before hitch-hiking back to her home at Whitedog. Significantly, at the time she was travelling alone around the countryside in this way, this girl was only fifteen years old.

These cases, buttressed by sworn affidavits, are only some examples of the kinds of hardships which many northern Indians must suffer because of the great distances between their homes and our legal institutions. We believe that it is unfair for destitute Indians to bear all of these costs necessitated by our legal system. Since the general society has decided that the courts should be located and conducted in places so far from the reserve communities, the general society ought to bear the cost of transporting people for whom it has failed to provide low cost public transportation. There is no valid reason why Indians in the north, guilty or innocent, should pay more for criminal justice than non-Indians in the south. On this basis, the Canadian Civil Liberties Association recommends that the Ontario Legal Aid Plan pay the travel costs to and from court and jail at least for those eligible to receive legal aid, in those situations where low cost public transportation is effectively unavailable.

IMPROVING LEGAL AID
In
CIVIL MATTERS

The Ontario Legal Aid Plan developed out of a purely voluntary programme, through the considerable efforts of many lawyers who were committed strongly to the view that the profession was obliged to undertake the legal care of those in need. From these modest beginnings, the Plan has grown immensely in scope and range. To-day the Ontario Legal Aid Plan spends a larger absolute amount of money than any other Canadian legal aid programme. Yet, while our present legal aid coverage appears rather comprehensive in criminal and family law matters, there is reason to question the adequacy of our response to the needs of low income people with other civil problems.

Consider these statistics. For the fiscal year ending March 1973, the Ontario Legal Aid Plan had processed to completion about twice as many family law matters (11,677) as all other civil matters combined (5,857).[11] By contrast, after a year and one-half of operations, the Quebec Legal Aid case load showed an equivalent number of family and non-family matters on the civil side (30,000).[12]

There is no basis to believe that the nature of the legal problems among the poor in Ontario differs so radically from the legal problems of their counterparts in Quebec. Thus, the most reasonable inference suggested by these statistics is that, as comprehensive as it is, the Ontario Legal Aid Plan is failing adequately to serve a great many of the legal needs of Ontario's lower income people.

There is additional evidence which tends to bolster this inference. Parkdale Community Legal Services serves a Toronto low income community of only some 60,000 people. This office generally does not take cases in which legal aid would issue and it does virtually no family law work. Yet, with a small staff of lawyers and a complement of students, Parkdale maintains 700 open files at any given time. In 1973 and 1974, it commenced work on more than 6,000 cases. In contrast to the Legal Aid Plan, during the last two years, Parkdale handled more landlord-tenant matters (711) than any other single category of case. Some of the other areas in which Parkdale was heavily involved include creditor and debtor matters (more than 500), unemployment insurance and workmen's compensation (366), immigration (263) and welfare (168). Likewise, the student legal aid offices at the various law schools in the Province carry substantial case loads - the Osgoode Hall Law students, for example, handled 659 cases last year, of which creditor and debtor matters constituted the largest single category. The students at Queen's University processed some 800 cases.[13]

While it is not possible accurately to estimate the size of the need unmet by the Ontario Legal Aid Plan, there is obviously hard evidence that such need exists. We know that every legal services programme which has operated in Ontario, independent of the Plan, has found itself immediately and permanently inundated with work.

We are pleased to note, subject to what was said earlier, that the Plan appears to be providing a reasonable level of legal service in criminal and family matters. In our view, however, a basic civil liberty, the right to counsel, is substantially unavailable to low income people in most areas of civil and administrative law. We do not say that certificates are never granted for such matters; we do say that the present evidence indicates something less than adequate endeavour in these areas.

Yet, so many of the legal problems of the poor concern basic human needs - food, shelter, clothing, medicine, etc. Such people find themselves in large numbers of public and legal relations - with landlords, doctors, welfare administrators, employers, government officials, etc. - each of whom may make decisions of profound impact on the lives of low income people. In our view, the Ontario Legal Aid Plan is doing too little to protect these vital interests.

While we appreciate that the present fee-for-service approach has some utility in criminal and family matters, we suspect that it is the primary cause of the serious failure of the Plan to deal adequately with all the other legal problems of the poor. Why did this happen?

First, the fee-for-service approach is essentially passive, depending upon the initiative of the individual with the problem. Since this initiative depends in turn on the individual recognizing his problem as a legal one, many problems which admit of legal solutions are never brought forward. So, the potential client, passive at his end, and the Plan, passive at its end, rarely meet. Although there has been some decentralization of intake in large centres during recent years, it must be said that the Plan has done little to reach out to so many of those whom it ought to serve.

Second, should the Plan and the client meet, all may be well if the client has a criminal or family problem; these fit well within the scope and previous experience of the private lawyer's everyday practice. But many of the other problems to which we have alluded do not. The lawyer may know little or nothing about the problem at hand. This may compound his difficulty in communicating with those people who are not as forthcoming and articulate as most middle class persons.

A third impediment in the fee-for-service model arises from the difficulty that many clients will have in trusting lawyers whom they did not know before and are not likely to see again. The present arrangements do not promote a continuity of contact and service.

Lastly, the Plan's fundamental weakness lies in the fact that its service is almost totally remedial and not sufficiently preventative. It is true that the Annual Reports show that, at present, some legal advice is given; the statistics are not informative as to exactly what is done. But what is not done is anything approaching community or public education about rights and remedies or pitfalls and opportunities. The cumulative effect of all this is that the Plan offers the poor too little too late.

It is our recommendation that criminal and family matters apart, the focus of the Plan ought to shift sharply away from its fee-for-service orientation and towards a community legal services approach. We do not, of course, contend that such an approach will be right for all parts of the Province for all time. We do say that it holds out the prospect of meeting that need with which the Ontario Legal Aid Plan apparently has failed to come to grips.

Full-time, salaried lawyers (supplemented by law students and para legal personnel where desireable) located in a community would be able to work to help people see the potential and limitations of legal solutions to the problems they may face. Unlike their fee-for-service counterparts, these lawyers could advertise their services and aggressively promote their use. Community education and the training of lay advocates could also be included within the range of their duties. Through continuous contact with their constituency, the lawyers would gain confidence in their ability to solve the problems at hand, and the community would at least have an opportunity to gain confidence in their lawyers. In the result, something more in the nature of a constructive

partnership might emerge. How much more useful than the remedial intervention of the middle class professional, long ago discredited in the social welfare field.

Moreover, lawyers have traditionally envisaged some problems as group problems - business, labour, management, oil interests. Lawyers assist in the formation of many such groups and in the representation of their interests. It is not news to lawyers or to anyone else that in unity there is strength. We think that every person is entitled to have his own case handled as something that is important and unique. Equally though, we think it is vital that, completely analagous to the profession's thinking in other spheres, a sound legal aid programme should concern itself with the various group interests among the poor. Individual cases are important, but the Ontario Plan has neglected the important work of providing representation in class actions, test cases, and legislative lobbying on behalf of the common interests of its constituency.

We see the community legal services approach as a flexible method of meeting the legal needs of the poor, a mechanism which contains the potential for adapting to different needs of different groups over different times and places. It is important, then, that flexibility be built into the Plan's administrative structure.

Accordingly, we recommend that the community legal service aspect of the Plan ought to be administered by a body which would basically serve as a fund grantor to private bodies which wish to provide legal services. In essence, one, two, or six lawyers, a law school, or an organization, for example, might apply to the administration for funds to run a legal service programme in some area or for some particular constituency. The administration might also exercise its own initiative and seek out competent and dedicated lawyers to provide services in those areas where it feels the need is sufficiently great. This approach would allow for a maximum of experimentation and innovation - perhaps a community clinic in a low income neighbourhood, a duty counsel stationed in a welfare office, a mobile service for a group of Indian reserves. With a flexible approach to questions like the eligibility criteria for clients, the acceptability to the community of the applicant group, the kinds of cases which must or must not be done, the administration would grant the funds.

In order to monitor the system, the Plan might provide periodic recourse to the private bar on a fee-for-service basis. Indeed, the fee-for-service concept could be retained as a backup for community legal services and as an essential ingredient for criminal and family law matters. We wish to make it clear, however, that we do not conceive of community legal services as a small adjunct to the Plan as it now exists. Instead, we are arguing for a major shift in focus - a new direction.

In our view, the system we advocate stands a better chance to provide a wider range of legal services for a greater number of people than any realistically conceivable alternative.

IMPROVING THE ADMINISTRATION
of
LEGAL AID

In our respectful opinion, the Law Society of Upper Canada should no longer be charged with the administration of this Plan. We hope that no one will interpret this recommendation as a criticism of the countless hours of free and dedicated work which the benchers and their associates have contributed to the development of legal aid in this Province. Indeed, on many occasions the Law Society has acted with speed and sensitivity when problems were directed to its attention.

But, despite the admirable dedication of past and present incumbents, these arrangements create a structural conflict of interest. The Law Society is simultaneously the trustee for large amounts of public money and the representative of the lawyers to whom much of this money is paid. While it is true that no breach of trust has ever been alleged or suggested, lawyers will be the first to recognize that a trustee ought not to be in a conflict of interest position.

Another factor which weighs against continued Law Society administration is the need, as pointed out previously, for maximum flexibility in the Legal Aid Plan. This means that substantially more open-ended discretion must be conferred upon the administrators than is presently the case. It will be readily perceived as inappropriate for any one constituency to exercise such immense statutory power.

Moreover, there is nothing in the lawyer's education, skills, or experience which supports a claim to monopoly control of the administration of such a programme. Techniques for the delivery of legal services are not, themselves, legal problems. Rather, they require the same kind of sophisticated social and administrative expertise as do other programmes of a similar nature. It would be unthinkable, for example, to grant the medical profession exclusive administrative control of our public medical insurance programmes.

Accordingly, we recommend the establishment of a new body to administer legal aid. In order to minimize the risk of government interference, this body should be something akin to an independent Crown Corporation whose Board members enjoy some degree of tenure and whose budget is guaranteed for fixed periods of years. In the interests of maximum flexibility, this body should be empowered, in turn, to appoint a number of regional corporations to administer the programme in various local communities.

The legal profession should certainly have representation on the Board but it should not command a majority position. Persons with a wide variety of skills and interests, including representatives of low income groups, should also be invited to participate.

A multi-representative Board with tenured members and reasonably long term funding should be structurally suited to operate a flexible programme, relatively free from undue political interference.

SUPPLEMENTS

to

LEGAL AID

A Special Service for Indian Communities

The concluding section of "Indian Life and Canadian Law" summarizes the state of Indian legal problems with the following statement.

> "A combination of logistical, financial, cultural, and administrative barriers blocks the effective delivery of statutory benefits to the Indian people".[14]

While we believe that the hurdling of so many barriers requires a flexible legal aid system of the kind previously suggested, the gravity of the Indian situation demands special attention, no matter what form the general legal aid programme takes.

The native people suffer all of the afflictions of the poor and then some. According to a recent survey, 75% of Indian families were living on less than $3000 per year and almost 50% on less than $1000.[15] Unemployment, welfare, and disease are chronic features of many Indian communities. Large numbers of Indians speak little or no English. Because of cultural differences, a high percentage of native people are unfamiliar with Canadian law and uncomfortable with Canadian institutions. Many of them would not recognize a legal violation if they suffered it and they would not complain even if they recognized it. These problems are compounded by the great distances which physically separate many Indian communities from the centres of legal service and redress.

Paradoxically, a great many of the legal problems of the native people are susceptible of rather simple solutions. In numbers of cases, all that would be required is the ready availability of someone who is generally familiar with the applicable law. During the time that the material was being gathered for "Indian Life and Canadian Law", Trust researchers were able to assist a great many Indians regarding the steps they should take to resolve their legal difficulties. So often, the Indians had no idea that they were entitled to certain benefits. So often, our field staff assumed the role of informing the Indians for the first time that they had legal remedies.

The following are a number of examples of the kinds of situations and cases where discussions with our field workers precipitated efforts on behalf of the Indians to vindicate their legal rights.

1. In August 1971, a northern Ontario Indian was violently pushed from a moving train. This left him with brain damage, an amputated leg, and a semi-paralysed arm. In the spring of 1972, one of our field workers discovered this man in a situation of almost total neglect. He had never been told that victims of crimes in Ontario have legal remedies. In the summer of 1972, an application was filed before the Criminal Injuries Compensation Board. In the result, the Board awarded this hapless person $200 per month for life.

2. Discussions with Indians who work as hunting and fishing guides revealed that in many cases the tourist operators who employed them were failing to give them adequate vacation pay and minimum wages as required by Ontario law. Accordingly, complaints were filed under the appropriate legislation. In one case alone, more than 80 Indians collected money which their employers had wrongly witheld from them.

3. An Indian woman on unemployment insurance for several months appeared for an appointment at the Unemployment Insurance office. Because of her faulty English, she gave the officer the erroneous impression that she would not accept alternate employment. On this basis, her payments were immediately terminated. Our field worker advised the woman that this decision could be appealed, and it was. The letter of appeal simply informed the District Unemployment Insurance office that the woman's faulty English and the absence of an interpreter had conspired to convey a mistaken impression regarding her intentions. In the result, her payments were restored including more than $200 to cover the period when they had been suspended.

4. An Indian, active in organizing trade union activity among the guides at a tourist establishment, was suddenly and summarily discharged after ten years of apparently satisfactory service. Our worker informed the man that Ontario labour law protects people from discrimination by reason of union activity. Accordingly, a complaint was filed with the Ontario Labour Relations Board. When the employer was notified of this action, he immediately reinstated the Indian man in his employ.

5. In a number of cases Indians had been overcharged by those with whom they were dealing for goods and services. Our field worker was quite helpful in suggesting ways in which these bills might be re-evaluated. The following are some

examples of the results of his assistance:

a) $100 was deducted from a bill which had been erroneously charged to a former Indian Chief
b) A grocer reduced an Indian's grocery bill by $24.00
c) A landlord settled a claim for $50 less than he had originally demanded of an Indian tenant.

6. Upon hearing an allegation that a particular service operation invariably required a 50% deposit from Indians but not from whites, our field worker instructed some Indians as to how to secure valid corroboration of the report. When evidence subsequently confirmed that this was indeed the practice, our worker advised the Indian complainants regarding the filing of complaints under the Ontario Human Rights Code. In the result, the proprietor apologized to the Indian complainants, accepted their work without deposit, and offered assurances that in future he would moderate his policy in comformity with the Code. The same course was adopted and the same results achieved in the case of a landlord who refused to accept Indians as residential tenants in his apartment building.

What is significant about the foregoing cases is the simplicity of the remedies. Unlike other matters which our field staff uncovered, these cases involved very few complex legal and procedural problems. What was needed was a general working knowledge of the applicable legislation and the available channels of redress. Yet, notwithstanding the simplicity of what was involved, these people had experienced deprivation for weeks, months, and longer. Indeed if it had not been for the coincidence of meeting our field staff, some of them might not yet have received their legal entitlement. In view of the extreme poverty of most Indians, even the smallest violations are matters of urgent necessity. What might be a petty problem to us could be a substantial deprivation to them.

There is no reason why Indians should be so dependent upon outside assistance to resolve these kinds of problems. These matters are sufficiently fundamental and the Indian people are sufficiently talented that, with proper training, they could readily look after their own interests.

Accordingly, as a partial response to the findings of its report, the Canadian Civil Liberties Education Trust has begun a programme to train citizen advocates among the Indians in the Kenora area. The programme involves instruction in a wide variety of statutory benefits which are of immediate relevancy to Indians in the north - unemployment insurance, employment standards, consumer protection, welfare, human rights, and legal aid, itself. These Indians are being trained in the techniques of advocacy - gathering evidence, documenting complaints, writing letters, and prodding government bureaucracies.

Although it is still too early for an adequate assessment of this programme, we believe that the concept is worthy of being adopted by the Ontario Legal Aid Plan. The idea is to develop in each reserve community which wishes it, one, two, or three "indigenous ombudsmen" who can seek out, recognize, and process certain types of legal problems. The minor statutory violations, they can probably handle completely on their own. The more complicated matters, they can refer to others. Hopefully, through a combination of their ability to work with their own people and the training they receive from the outside, the advocates will be able to bridge many of the gaps between their society and our institutions.

By training and employing Indian advocates, the Plan could promote faster on-the-spot recognition of and response to legal violations. Not the least of the benefits of this approach is the dignity which would accrue to a deprived people when they acquired the skill to master their own problems.

Accordingly, we recommend that the Legal Aid Plan offer to willing Indian communities an opportunity to participate in programmes for the training and employment of indigenous citizen advocates. While such a proposal would hardly be adequate to meet the vast needs of the Indian people, it would certainly represent a constructive step.

Extending Legal Assistance Beyond the Poor

Assistance for the poor should not exhaust the concerns of Ontario's legal aid programme. Many members of the upper working classes and the lower middle classes could be and have been financially annihilated through involvement in the legal processes. Even when their claims are legally valid, people of modest means are in a poor position to challenge their more affluent adversaries.

In this regard, we believe that the very least the Ontario Government might do is to encourage the creation and growth of private pre-paid legal insurance schemes. Consumer co-operatives, labour unions, credit unions, business associations, and ratepayers organizations, through a pooling of collective resources, could provide a wide variety of protective programmes for their members. The minimum role of government is to adopt policies which are hospitable to experimentation with legal insurance in the voluntary sector. At present, for example, certain regulations of the Law Society of Upper Canada prohibit lawyers from participating in arrangements which direct potential clients to their firms.[16] Yet effective legal insurance programmes for large membership organizations might require that certain lawyers be available, by pre-arrangement, to service their constituencies.

Through its power to approve by order in council the regulations of the Law Society,[17] the Ontario Government might promote the enactment of regulations which are more compatible with the existence of pre-paid legal insurance. The Government might also consider the provision of tax relief and other incentives. In short, the Canadian Civil Liberties Association asks the Task Force to recommend that the Ontario Government do what it can to create a climate favourable to the development of pre-paid legal insurance in the voluntary sector of this Province.

Reducing the Private Costs of Certain Legal Processes

The goals of Legal Aid require not only improvements in delivering services but also a reduction in the costs of those services. There are certain kinds of legal processes which, in our view, are needlessly cumbersome and expensive. People of modest means are often reluctant to sustain the expense and withstand the pressures of the protracted conflict necessitated by existing avenues of redress. We believe, therefore, that the Task Force might well consider ways and means of simplifying certain existing legal procedures.

Essentially, we are proposing that in certain types of cases - consumer matters, landlord-tenant disputes etc. - there be an alternative or supplement to court. New tribunals or boards should be established which would attempt, in the first instance, to investigate and to mediate. Faced, for example, with a tenant complaint that a landlord had failed to provide the proper amount of heat, the board would dispatch an investigator to interview all of the witnesses and to examine the premises. On the basis of this informal investigation, the board would make a finding on the merits of the dispute. At that point, it would attempt also informally, to effect a settlement which would implement the parties' rights under the contract and the law. Such a settlement, if favourable to the tenant, might provide, for example, for the payment of damages, an abatement of rent for a certain period, and/or a correction of the violation. There is good reason to believe that conscientious investigation and sensitive conciliation by competent third parties could successfully resolve a great many such disputes at much less cost and trouble to the disputants.

If, on the other hand, settlement attempts were to fail, the board or tribunal might then be empowered to issue an order which, after a specified period, say four days, could become binding on the parties involved. Because of the high degree of informality in the board's adjudicative procedures, the party against whom the order was made should have a residual right, within the specified period, to challenge the order in the courts.

But the initiative at this point would devolve upon the party against whom the order was made. If, for example, the board had found for the complainant, the respondent would have the onus of going to court. The primary defendant in the action would be not the original complainant but the board, itself. It would work the same way, of course, if the board were to make a finding that the original complaint was devoid of merit. In that event, if the complainant wished to challenge the order, he would be obliged to take the board, rather than the original respondent, to court. In other words, to whatever extent the board had made a finding favourable to one of the parties the board would put its, i.e. the public's, resources behind that party's interests.

The interposition between the parties of such investigative and mediative machinery could reduce the influence of financial cost in the determination and vindication of many legal rights. While this is not the place to describe this machinery in exhaustive detail, it is the place to recommend experimentation with the concept. The consequence for many people would be less burdensome, more expeditious, and lower cost justice.

Public Information and Education

In the criminal law section of this brief, we pointed out the need for an educational programme to acquaint the public with the opportunities for legal aid in the pre-trial stage of the criminal process. What was said there applies to the entire range of legal aid services.

Compared to other public services, there is hardly any advertising of the Legal Aid Plan. Yet, compared to other sectors of the community, the poor are frequently less aware of their rights and less vigorous about exercising them. It is difficult to conceive of a more flagrant denial of civil liberties than that suffered by those whom the poverty syndrome renders unable to enforce their legal rights. We believe, therefore, that, where so vital a service as legal aid is concerned, the Government has a duty to inform the ignorant and encourage the reluctant.

Accordingly, we call upon the Task Force to recommend a widespread programme of public education designed to inform people of their legal aid rights and to encourage them in the exercise of those rights. To this end, Government should advertise in the press, on radio, television, tramways, taxis, billboards, etc. Leaflets and other forms of literature should be distributed in the low income areas all over this Province.

No programme of this kind could hope adequately to work unless its intended beneficiaries were properly alerted to its existence and its provisions.

SUMMARY OF RECOMMENDATIONS

The Canadian Civil Liberties Association requests the Task Force on Legal Aid to recommend to the Ontario Government the following measures.

On Improving Legal Aid in Criminal Matters

In order to ensure timely access to counsel,

1. make duty counsel service available to every place of incarceration,
2. launch a programme of public education to acquaint the community with the custodial duty counsel service,
3. instruct all police departments and police officers to inform arrested people, at the earliest practicable moment following arrest, of their right to legal aid,
4. instruct all police departments and police officers to take all reasonable steps for the effectuation of communication between accused and legal aid counsel, at the earliest practicable moment following arrest,
5. instruct all police departments and police officers that, in the absence of some imminent and overriding peril, the obligation to advise arrested persons about legal aid and to provide communication facilities for legal consultation, must precede any custodial interrogations.

In order to correct pockets of inequity,

6. pay the travel costs to and from court and jail at least for those eligible to receive legal aid in those situations where low cost public transportation is effectively unavailable.

On Improving Legal Aid in Civil Matters

7. shift the focus of the Plan from its fee-for-service orientation towards a community legal services approach.

On Improving the Administration of Legal Aid

8. remove from the Law Society of Upper Canada its control of legal aid administration and replace it with an independent Crown Corporation which would have a multi-representative board, tenured members, and long term funding.

On Supplements to Legal Aid

As a special service to Indian communities,

9. train and employ, in each reserve community which wishes it, indigenous citizen advocates who are equipped to seek out, recognize, and process those minor legal problems of immediate relevancy to Indians in the north.

In order to extend legal assistance beyond the poor,

10. adopt policies which would create a climate favourable to the development of pre-paid legal insurance in the voluntary sector.

In order to reduce the private costs of certain legal processes,

11. establish in certain types of cases a new tribunal which, subject to a residual right of judicial review, would investigate, conciliate, and adjudicate in a less costly and more expeditious manner.

In order to cope with the knowledge gaps and inhibitions of potential clients,

12. undertake a vigorous and comprehensive programme of public education designed to inform and encourage eligible people to take advantage of the legal aid benefits provided by law.

Respectfully Submitted

Canadian Civil Liberties Association

FOOTNOTES

1. The results of the first two Toronto surveys may be located as follows: (i) August 1973 - submission of the Canadian Civil Liberties Association to the Task Force On Policing in Ontario; (ii) January 1974 - Toronto Star and Toronto Globe & Mail, February 11, 1974.

2. Driver, "Confessions and the Social Psychology of Coercion", 82 Harvard Law Review 42 (1968).

3. Hardin, "Other Answers...", 113 U.Pa. L. Rev. 165, at 171-172, (1964).

4. Scottish Home & Health Department, Criminal Statistics: Scotland 1971, p. 43.

5. Statistics Canada, "Criminal Statistics 1971".

6. In 1963 Scotland had a conviction rate of 91.1%; Canada's was 90.1% in 1963: Report of the Canadian Committee on Corrections, 1969, p. 153n.

7. 384 U.S. 436 (1966).

8. The United States Supreme Court held that ~~any statement obtained from a~~ suspect as a result of a police interrogation was not admissible in evidence against him unless the following safeguards were complied with:
   (1) The suspect must first be told that he has a right to remain silent, and that anything he says may be given in evidence against him at trial.
   (2) The suspect must also be told that he has the right to obtain the assistance of counsel, and that, if he cannot afford to retain counsel of his choice, counsel will be appointed for him. Furthermore, he may not be interrogated in the absence of counsel unless he has given a clear and intelligent waiver of this right, and that such a waiver may be withdrawn at any time during interrogation, at which point the interrogation must cease until counsel is present or until the waiver is renewed.

9. Seebunger and Wattich, "Miranda in Pittsburgh: A Statistical Study", 29 U. Pitt. L. Rev. 1 (1968).

10. Canadian Civil Liberties Education Trust (April 1973), pp. 9-10.

11. Ontario Legal Plan, Annual Report, 1973.

12. Robert M. Cooper, "Legal Aid in Quebec" (as yet unpublished article).

13. From the records of: Parkdale Community Legal Services; Community Legal Aid Service Program, Osgoode Hall Law School; Queen's University Student Legal Aid Society.

14. Op. cit., p. 41.

15. Proceedings of the Special Senate Committee On Poverty, 2nd Session, 28th Parliament, Proceedings No. 14, 20 January 1970.

16. Law Society of Upper Canada, Professional Conduct Handbook, Ruling 3.

17. Law Society Act, S.O. 1970, c. 19, s.55.